IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DEANNA DWYER, INDIVIDUALLY AND AS NEXT FRIEND FOR BLAKE DWYER, A MINOR	§	
v.	§	**CASE NO. 4:09-CV-00198-MHS-ALM**
CITY OF CORINTH, TEXAS, A TEXAS HOME RULE CITY, DEBRA BRADLEY, CHIEF OF POLICE OF THE CITY OF CORINTH, KEVIN TYSON, A POLICE OFFICER FOR THE CITY OF CORINTH, CRAIG HUBBARD, A POLICE OFFICER FOR THE CITY OF CORINTH, CARSON CROWE, A POLICE OFFICER FOR THE CITY OF CORINTH, AND TASER INTERNATIONAL, INC.	§	

DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT

DEFENDANT, Sergeant Kevin Tyson, files this Response to Plaintiffs' Supplemental Brief in Support of Motion for New Trial and would respectfully show this Honorable Court the following:

I. REASONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

1. Plaintiff's motion is so general and vague that it does not state with particularity what would warrant a new trial in this matter. Plaintiff makes unspecific allegations that improper leading questions caused an unjust verdict and that the evidence should have caused the jury to render a decision in favor of Plaintiff. At no time, does Plaintiff identify a single witness or

portion of testimony that support his vague complaints about why the outcome of trial should have been different.

2. Plaintiff's motion does not show that the evidence weighs so overwhelmingly in favor of one party that reasonable people could not disagree. To the contrary, the evidence was so overwhelmingly in favor of Defendant, Sergeant Tyson, that Plaintiff does not establish any reason to upset the jury's unanimous verdict in favor of Sergeant Tyson.

II. PROCEDURAL BACKGROUND

3. Sergeant Kevin Tyson was vindicated on October 15, 2010 by a unanimous federal jury verdict in the excessive force lawsuit brought by Plaintiffs Deanna Dwyer and Robert Blake Dwyer. Prior to trial, Officers Carson Crowe and Craig Hubbert, as well as the Chief of Police, Debra Bradley (Walthall) and the City of Corinth, Texas were dismissed by summary judgment.

4. Plaintiff initially filed a generic, boilerplate Motion for New Trial. The motion was so general and vague, Plaintiff was ordered to file briefing in support of the motion. Plaintiff filed his supplemental briefing on November 12 to which Defendant responds.

III. EVIDENCE SUBMITTED AT TRIAL

5. The lawsuit arose from an incident occurring on the morning of July 18, 2007 that began with a 911 call to the Denton County Sheriff's Office. Travis Baker, a friend of Blake Dwyer, thought Blake was having an epileptic seizure when they were getting ready to go to summer football practice that morning. Travis reported that Blake was having convulsions and needed immediate medical intervention.

6. When paramedics and firefighters of the Lake Cities Fire Department arrived, they found Blake, then a minor, unresponsive and unable to respond to their questions. Blake's friends did not offer any meaningful information about Blake's medical history at that time, despite being

aware of Blake's prior seizures. The friends also failed to disclose that they, including Blake, had all been smoking marijuana the night before and stayed up until 4:00 a.m. playing video games. Blake testified at trial that insufficient sleep would almost always trigger a seizure. There were no parents around and, because Blake's parents were unavailable, the Lake Cities Fire Department was required to take Blake to the hospital.

7. Things took a sudden and dramatic turn for the worse soon after Blake was placed in a "stair chair", a type of chair used to move Blake down the stairs to an awaiting cot. Halfway down the stairs, Blake became extremely combative and violent, threatening to launch himself and the paramedics holding him over the side of the stairs. The Lake Cities Fire Department report noted that Blake exerted "massive strength" and, despite the efforts of five (5) paramedics/firefighters, they were unable to control Blake and move him safely to the ambulance. During the struggle, a marijuana pipe fell out of Blake's pocket which led the paramedics/firefighters to think that they were dealing with drug overdose. An anti-opiate medication was administered to Blake in addition to a large dosage of Ativan, a type of sedative similar to Valium. The sedative and the anti-opiate had no effect on Blake as he continued to thrash about and, at one point, punched a paramedic in the face. The paramedics/firefighters could not keep Blake on the cot, despite having all five (5) of them attempting to restrain him. With no alternative, the Lake Cities Fire Department called for police assistance from the City of Corinth, Texas Police Department.

8. Officers Kevin Tyson, Carson Crowe and Craig Hubbert arrived to find the paramedics/firefighters still struggling with Blake. Officers Crowe and Hubbert were busy talking to the other kids and securing the scene while Sergeant Tyson attempted to help control Blake. Trial testimony confirmed that Sergeant Tyson was never informed of Blake's condition

or that he had suffered a seizure. Sergeant Tyson first tried to verbally warn Blake and help calm him down. Blake was unresponsive and, with no alternative, Sergeant Tyson deployed his Taser. Because of the proximity of the other personnel, Sergeant Tyson did not fire the prongs but instead "drive stunned" Blake, which is an application where the Taser is pressed against the skin and then discharged. Sergeant Tyson first discharged the Taser in the air to again warn Blake that it would be used. The Taser gives off an electrical click when the trigger is pulled. Again, without any response, Sergeant Tyson drive stunned Blake with the Taser. The application was successful enough to calm Blake to a point where he could be further restrained. However, the effects were short lived and Blake would continue to be extremely violent. It required multiple drive stuns to gain control over Blake until he was moved to the ambulance. Because Blake was thrashing about so violently, the Taser would actually jump across his body which led to multiple Taser marks on his back and shoulders. During this time, Chief Thiessen, of the Lake Cities Fire Department, called Denton Regional Medical Center to obtain authorization to administer Versed, a strong sedative used for patients in pre-surgery. Permission was given by the physician to administer the Versed. Once Blake was put into the ambulance, a second IV was successfully obtained and Blake was given the Versed through the IV, after which Blake became immediately unconscious.

9. Deanna Dwyer, mother of Blake Dwyer, brought suit claiming excessive force and failure to intervene to prevent excessive force against Sergeant Tyson, Officers Crowe and Officer Hubbert. The Dwyers also sued the newly elected Chief of Police Debra Walthall (Bradley) and the City of Corinth, Texas for "failure to properly train, supervise, test, regulate, discipline or otherwise control its employees and the failure to promulgate and enforce proper guidelines for the use of Tasers." Plaintiffs also sued Taser International, Inc. for product liability claims.

10. Plaintiffs voluntarily dismissed their claims against Taser International, Inc. Pursuant to motions filed by Defendants, the claims against Officers Crowe, Hubbert, Chief Walthall (Bradley) and the City were dismissed prior to trial. Only the excessive force claim against Sergeant Tyson remained.

11. During the trial, the jury heard the evidence submitted by both Plaintiff and Defendant. The evidence was overwhelmingly in favor of Sergeant Tyson and established that he did not employ excessive force on the day in question. After a four day trial, the jury rendered a unanimous verdict in favor of Sergeant Tyson.

IV. APPLICABLE LAW

12. The decision to grant a new trial under Rule 59 rests soundly within the discretion of the district court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980); *Pryor v. Trane Company*, 138 F.3d 1024, 1026 (5th Cir. 1998). A new trial may be granted pursuant to Rule 59 "on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." FED. R. CIV. P. 59(a). "Although Rule 59(a) does not enumerate grounds for a new trial, a district court may grant a new trial if the court finds that the verdict is against the weight of the evidence, the damages awarded are excessive or inadequate, the trial was unfair, or prejudicial error was committed in its course. Additionally, a new trial must be granted when the Court is unable logically to reconcile an inconsistent jury verdict. And, when a motion for a new trial is based on evidentiary grounds, the court should not grant a new trial, unless 'the verdict is against the great weight of the evidence.'" *Oyefodun v. City of New Orleans*, 2001 U.S. Dist. LEXIS 10008, *5-6 (E.D. La. 2001) (internal citations omitted) (quoting Pryor, 138 F.3d at 1026.). The Fifth Circuit favors the jury verdict and requires that the verdict stand on a motion for new trial, unless when

viewing all evidence in the light most favorable to the jury's verdict, the evidence weighs so overwhelmingly in favor of one party that reasonable people could not disagree. *Id*. (citing *Jones v. Wal-Mart Stores, Inc*., 870 F.2d 982, 986-87 (5th Cir. 1989)). "[A] judgment should not be set aside except for substantial reasons." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2804 (2d ed. 1995). A court may grant a new trial in order to protect the interests of justice and fair play in response to inappropriate statements by counsel. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 582 (5th Cir. 1993).

13. Plaintiffs' excessive force claim was based on an alleged application of force that occurred when Blake Dwyer was being taken by police and paramedics to a hospital for medical treatment, apparently against his will or, at least, without his express consent. As such, it was controlled by 4th Amendment principle.

14. In order to prove a violation of rights under the 4th Amendment by the use of excessive force, Plaintiffs must establish that Blake Dwyer: (1) suffered a physical injury; (2) which resulted directly and only from a use of force that was clearly excessive to the need; and (3) the excessiveness of the force employed was objectively unreasonable. *Flores v. Palacios,* 381 F.3d 391 at 396 (5th Cir. 2004); *Knight v. Caldwell*, 970 F.2d 1430 at 1432-33 (5th Cir. 1992); *Johnson v. Morel*, 876 F.2d 477 at 480 (5th Cir. 1989). The standard to be applied is an objective one. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386 at 396 (1989). This objective standard involves balancing the amount of force used with the need for the use of force under clearly established law. Colston v. Barnhart, 130 F.3d 96 at 99 (5th Cir. 1997).

15. The evidence presented by Defendant was overwhelming. Sergeant Tyson, Officer Crow and the fiver paramedics/firefighters, one of which is a former police officer, all testified that Sergeant Tyson's conduct was not excessive, but, was in fact necessary and the only assistance which allowed control over Blake Dwyer. Plaintiff did not offer *any* testimony from a qualified police officer or expert that rebutted that of Sergeant Tyson, Officer Crow or the paramedics/firefighters.

16. The alleged evidence cited to by Plaintiff is even more incredible and contains inappropriate argument noting Plaintiff's spin on some of the evidence presented. Plaintiff makes inflammatory remarks such as Sergeant Tyson filed "a false or deliberately misleading use of force report form…" which was never supported by the evidence and which is also irrelevant to the question posed to the jury. The jury was allowed to consider all of the evidence, both of Plaintiff and Defendant, and rendered its verdict in accordance with the instructions given by the Court. The evidence clearly supports upholding that decision and it should not be disturbed.

17. Plaintiff's complaint regarding the purported leading questions by defense counsel reads more like a story or a lecture rather than reasons to upset the jury's verdict. Plaintiff's motion does not cite to any question, line of questioning, witness, evidence, exhibit, or any other portion of trial that was corrupted from counsel's questioning. The motion is so general, Defendant does not know how to coherently respond to Plaintiff's complaints. Plaintiff simply restates over and over that there were leading questions and that bad evidence was let in. On its face, Plaintiff's motion fails to provide any notice as to the grounds to order a new trial. Plaintiff simply regurgitates that there were leading questions and that some unidentified witness or witnesses were not allowed to testify. The motion is so vague it is arguably frivolous and should be denied in its entirety.

18. Plaintiff simply fails to provide any valid reason to undo the jury's unanimous verdict. The evidence supported the verdict and Plaintiff's motion is without merit.

WHEREFORE, PREMISES CONSIDERED, and for the foregoing reasons, Defendants respectfully request that this Honorable Court deny Plaintiff's Motion for New Trial and Plaintiff's Supplemental Brief in Support of Motion for New Trial and for all such other and further relief, both at law and in equity, general and special, to which Defendant may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed electronically in compliance with Local Rule CV-5(a) on the 26th day of November 2010, and was thus served on all counsel who have consented to electronic service.

/s/ William W. Krueger, III
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